IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
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No. 77-1491

GEO CONTROL, INCORPORATED and
NEW HAMPSHIRE INSURANCE COMPANY,
Petitioners,

vs.

GENEVIEVE O. RASMUSSEN and
WILLIAM C. RASMUSSEN, JR.,
Respondents.

No. 77-1465

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,
Petitioner,

vs.

GENEVIEVE O. RASMUSSEN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS GEO CONTROL, INCORPORATED and NEW HAMPSHIRE INSURANCE COMPANY

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BRIEF FOR THE PETITIONERS GEO CONTROL, INCORPORATED and NEW HAMPSHIRE INSURANCE COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 565 F. 2d 1385. The opinion is printed in Appendix A, pp. 1a-14a, of the Petition for a Writ of Certiorari, No. 74-1465, filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of the Workers' Compensation Programs, United States Department of Labor, requesting review of the same decision. The opinion of the Benefits Review Board, printed in Appendix B, pp. 15a-25a, of the Solicitor General's Petition is reported at 1 BRBS 378. The opinion of the administrative law judge, printed in Appendix C, pp. 26a-74a, of the Solicitor General's Petition, is unreported. Petitioners incorporate by this reference as if set forth in full the Appendices printed in the Solicitor General's Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1978. The petition for a writ of certiorari in No. 77-1465 was filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor. The petition for a writ of certiorari in No. 77-1491 was filed April 19, 1978, by Geo Control, Incorporated and New Hampshire Insurance Company. The petitions were granted and the cases consolidated on June 12, 1978. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether death benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, are limited to the same maximums as disability benefits?

STATUTES INVOLVED

The relevant pre-1972 provisions of the Longshoremen's and Harbor Workers' Compensation Act[1] appear in the left-hand column, while the same sections as amended and new sections appear in the right-hand columns. Changes as a result of the 1972 amendments[2] are printed in italics.

PRE-1972	POST-1972
Section 9.[3] . . .	Section 9.[4] . . .
If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:	If the injury causes death, or *if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury,* the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
• • • • •	• • • • •

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[1] 44 Stat. 1426 as amended 75 Stat. 203, 33 U.S.C. 901 (1970).

[2] Pub. L. 92-576, §22, 86 Stat. 1251 (effective November 26, 1972).

[3] 33 U.S.C. 909 (1970).

[4] 33 U.S.C. 909 (Supp. V).

PRE-1972

(b) If there be a surviving wife or dependent husband and no child of the deceased to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in the case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages.

POST-1972

(b) If there be a *widow or widower* and no child of the deceased to such *widow or widower 50* per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of *16⅔* per centum of such wages for each child; in the case of the death or remarriage of such *widow or widower,* if there be one surviving child of the deceased employee, such child shall have his compensation increased to *50* per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, *50* per centum of such wages increased by *16⅔* per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such

PRE-1972

POST-1972

a requirement the appointment of a guardian for such purposes shall not be necessary.

• • • • • • • • • • •

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

Section 6.[5] . . .

(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: Provided, however, That if the employee's average weekly wages, as computed under section 10 are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

Section 6.[6] . . .

(b)(1) Except as provided in subsection (c), compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

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[5] 33 U.S.C. 906 (1970).
[6] 33 U.S.C. 906 (Supp. V).

PRE-1972

POST-1972

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

(c) The maximum rate of compensation for a nonap-

PRE-1972

POST-1972

priated fund instrumentality employee shall be equal to 66⅔ per centum of the maximum rate of basic pay established for a Federal employee in grade GS—12 by section 5332 of title 5, United States Code, and the minimum rate of compensation for such an employee shall be equal to 66⅔ of the minimum rate of basic pay established for a Federal employee in grade GS—2 by such section.

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

STATEMENT

This case arises out of a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act,[1] as extended by the Defense Base Act. 55 Stat. 622, 42 U.S.C. 1651 (1970). The facts are not in dispute and were stipulated by the parties.

William C. Rasmussen worked as a hydrologist for petitioner Geo Control, Incorporated, under a public

[1]Hereinafter also referred to as the Act or the Longshoremen's Act.

works contract between his employer and the United States. The employer was insured for workers' compensation liability by petitioner New Hampshire Insurance Company.

On May 11, 1973, while riding as a passenger in a jeep, Rasmussen was killed by a landmine explosion in South Vietnam. At the time of his death his average weekly wage was $798.00. Respondents, Genevieve O. Rasmussen and William C. Rasmussen, Jr., are his surviving widow and son. The employer and insurance carrier agreed to the survivors' entitlement to weekly death benefits, but a dispute arose as to the amount of benefits.

The claim was accordingly referred to an administrative law judge for hearing. In his decision of October 24, 1974, the administrative law judge ruled that the weekly amount of death benefits was determined only under Section 9 at a percentage of the employee's average weekly wage. He awarded to the widow 50% of the decedent's average weekly wage and to the son 16⅔% of the average weekly wage for a total weekly benefit of $532.00.

In making this award against petitioners, the administrative law judge rejected the contention advanced by petitioners and the Director, Office of Workers' Compensation Programs, who joined with petitioners in urging that under proper statutory interpretation, death benefits are limited by the same maximum as inter vivos, disability benefits. The employer and insurer contended that ever since the enactment of the original legislation in 1927, disability and death benefits were subject to identical limi-

tations. They urged that even though the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act did not include an expressly stated monetary maximum for death benefits in Section 9, when that Section is read together with Sections 6(b) and (d), it establishes a maximum identical to disability benefits. Application of this maximum would have resulted in an initial weekly benefit of $167.00, instead of the weekly benefit of $532.00 awarded.

Upon the employer and insurer's petition for review, the Benefits Review Board affirmed. It acknowledged that the absence of an identical maximum for death benefits created an anomalous situation, conceding that thereby benefits to the survivors of an employee would be greater than the disability payments to the same employee if he were permanently and totally disabled. Solicitor General's Petition, App. B, p. 18a.

The Court of Appeals for the Ninth Circuit affirmed the Board's decision on the grounds that the language of Section 9 of the Act did not explicitly contain a maximum dollar limitation on death benefits, and that the greater weight of the legislative history disclosed no intent of Congress to apply disability maximums to death benefits. The court specifically recognized and rejected the contrary views of the Third[8] and District of Columbia[9] Circuit Courts of Appeals.

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[8] *Director, Office of Workers' Compensation Programs v. O'Keefe*, 545 F. 2d 337 (3d Cir. 1976).

[9] *Director, Office of Workers' Compensation Programs v. Boughman*, 545 F. 2d 210 (D. C. Cir. 1976).

ARGUMENT

I

THE MOST REASONABLE AND LOGICAL INTERPRETATION OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT LIMITS BENEFITS FOR DISABILITY AND DEATH TO THE SAME MAXIMUM.

This petition raises an important question of statutory construction under the Longshoremen's and Harbor Workers' Compensation Act. In the hope of clarifying the complex structure of the benefits scheme under the pre-1972 and post-1972 Act, the employer again sets forth in an abbreviated fashion the sections chiefly at issue. Changes as a result of the 1972 amendments are printed in italics.

PRE-1972	POST-1972
Section 9. Compensation for death . . .	Section 9. Compensation for death . . .
(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.	(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*
Section 6. . . .	Section 6. . . .
(b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: Provided, however,	*(b)(1) Except as provided in subsection (c), compensation for disability shall not exceed the following percentages of the applicable national average weekly*

PRE-1972	POST-1972
That if the employee's average weekly wages, as computed under section 10 are less than $18 per week he shall receive as compensation for total disability his average weekly wages.	*wage as determined by the Secretary under paragraph (3):* *(A) 125 per centum or $167, whichever is greater during the period ending September 30, 1973.* *(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.* *(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.* *(D) 200 per centum beginning October 1, 1975.* *(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.*

• • • • •

PRE-1972	POST-1972
	(b) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

The Act, as amended, speaks explicitly only of a minimum amount for death and inter vivos disability benefits and of maximum amount only for disability benefits. As recognized by all three Circuit Courts of Appeals,[10] Section 9 no longer expressly provides a maximum benefit for death claims. The conflict among the same lower courts, thus focuses upon the issue of whether the absence of an express maximum in Section 9, can be interpreted as Congressional intent to eliminate any upper limits for death benefits.

The right and duty of this Honorable Court to ascertain Congressional intent is well established.[11] Thus statutory language,[12] the purpose of the enactment,[13]

[10] *Rasmussen*, 567 F. 2d at 1387, Solicitor General's Petition, App. A at 6a; *Boughman*, 545 F. 2d at 213; *O'Keefe*, 545 F. 2d at 341.

[11] *Caminetti v. United States*, 242 U.S. 470 (1916).

[12] *United States v. Oregon*, 366 U.S. 643, 648 (1961).

[13] *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 284, 390-395 (1951).

legislative history[14] and all other evidence of Congressional intent may be considered.[15] It is respectfully submitted that the decision below in erroneously concluding the death benefits are not limited to the same maximum as disability benefits is contrary to the only persuasive logical, historical and social evidence of Congressional intent.

A. The 1972 amendments should be reasonably interpreted to avoid an absurd and discriminatory consequence.

The illogical and unreasonable effect of finding no absolute limit of death benefits is immediately apparent. If the decedent herein had sustained a serious, nonfatal injury which had resulted in a permanent, total disability, then he and his dependent wife and child would receive benefits subject to the maximum provided in Section 6(b), initially $167.00 per week, now 200% of the national average of the weekly wage. The court below reasons, however, that the same dependents in the event of the employee's death receive benefits of $532.00 unlimited by a fixed maximum.

We respectfully submit that there is no persuasive evidence that Congress intended to create this startling and incongruous disparity. Such an inequitable classification would discriminate against "totally disabled employees in need of continuing care," who

[14] *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

[15] *United States v. American Trucking Association*, 310 U.S. 534, 542-544 (1940).

would be "compensated less generously than the family of an employee who dies." *Boughman,* 545 F. 2d at 213. Such a result is contrary to common sense and logic.

B. The decision of the court below is a radical departure from the historical purposes and social policy of the Act and all other similar workers' compensation statutes.

Additional evidence of the error below is demonstrated by an historical examination of the Act in context of past and present social policy. The original legislation[16] was enacted in 1927 as a result of prior, unsuccessful efforts by the States[17] and by Congress[18] to extend the coverage of state workers' compensation statutes to maritime employees. Passage of the Act was at the concluding phase of a movement during the preceding two decades, such that by 1920 all but eight states had replaced the jury system of tort liability with basically similar administrative compensation schemes.[19] The historical factors leading to the enactment of those compensation

[16]Act of March 4, 1927, c. 509, 44 Stat. 1424.

[17]*Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) (New York Workmen's Compensation Act could not be extended consistent with the United States Constitution to provide benefits on behalf of an employee killed aboard a ship whose cargo he was unloading). See discussion in GILMORE AND BLACK, THE LAW OF ADMIRALTY (1975 ed.) at 405.

[18]*Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920) (Congressional addition to the "Saving to Suitors" clause of a phrase preserving for longshoremen rights and remedies under state workmen's compensation acts invalid delegation of federal powers to states). See discussion, GILMORE & BLACK, *supra,* at 407.

[19]1 LARSON, WORKMEN'S COMPENSATION LAW §5.30 at 39 (1978 ed.).

laws and the Longshoremen's Act involved a trade-off among all persons affected by industrial injuries.[20]

For the employer, compensation statutes imposed liability and payment without regard to their fault. In exchange the amount paid was typically less than an adverse jury verdict and also predetermined under a schedule of benefits. Private insurance became an available means by which the employer was able to transfer the costs of premium to the cost of production and ultimately to the consumers of the product.

For employees the time consuming delays of the litigious tort process were reduced. Even though some employees under the tort system obtained large verdicts, the great majority of pre-compensation claims were thwarted by the common law defenses available to the employer. Under the compensation system the employee concurrently lost his or her right to recover for care, comfort, pain, suffering, companionship and other elements of damage recognized in tort, but gained the right to receive prompt payment of physicians', hospitals' and other medical expenses. Also guaranteed to employees was the replacement of wages lost during periods of convalescence and disability.

[20]GILMORE & BLACK, *supra,* at 410. See generally 1 LARSON, *supra,* Chapter 1 "The Nature of Workmen's Compensation," and Chapter 2 "Development of Workmen's Compensation," at 1-40 (1978 ed.); THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (Washington, D.C.; July, 1972), Chapter 1, Section A, "The Basic Nature of Workmen's Compensation," and Section B, "The Origins of Workmen's Compensation in America," at 32-35.

The replacement of the lost wages provided the necessary financial assistance to prevent the injured worker and his or her family from becoming destitute and dependent upon public assistance. The wage loss replacement was automatically paid, but under every every state[21] and federal[22] compensation scheme subject to minimum and maximum amounts. The minimum affected only low income employees, who as a result thereof were at least assured of receiving some benefits. The maximum affected only high income employees, who received less than their pre-injury salary and were thereby motivated to return to gainful employment at the earliest possible date.

The principle of compensation, subject to a benefit maximum, as the replacement of lost wages was thus a chief feature of the original Act and all other similar compensation systems. Compensation was even defined in the Act as the benefit payable to the employee for disability and to his or her dependents for death.[22a] Disability and death benefits were also juxtaposed in other sections of the Act relating to injury,[23] coverage,[24] notice of the employee to the employer,[25]

[21]All state workers' compensation laws have retained an absolute dollar maximum for death benefits. Chamber of Commerce of the United States, ANALYSIS OF WORKMEN'S COMPENSATION LAWS (1975 ed.) Chart VII: Fatalities—Income Benefits For Spouse and Children.

[22]Federal Employers Compensation Act, 5 U.S.C. §§ 8109, 8133; Social Security Act, 42 U.S.C. § 402(e) (2); Veterans Benefits Act, 38 U.S.C. §§ 314, 322, 334, 342.

[22a]44 Stat. 1424, as amended, 33 U.S.C. 902(12) (1970 ed.).

[23]44 Stat. 1424, as amended, 33 U.S.C. 902(2) (1970 ed.).

[24]44 Stat. 1426, as amended, 33 U.S.C. 903 (1970 ed.).

[25]44 Stat. 1431, as amended, 33 U.S.C. 912 (1970 ed.).

the time for filing of the claims,[26] the employer's record keeping requirements,[27] reports of injury[28] and accidents where third parties were liable.[29] The similarity of treatment to the employee in the case of disability and his or her dependent survivors in the case of death was underscored by the maximum benefit for which both classes of beneficiaries was identical in the original Act.[30]

Every subsequent amendment[31] to the minimum and maximum maintained the exact parity of benefits for disability and for death. Even though the permanently and totally disabled employee or an employee fatally injured would never reenter the labor market, the maximum applied equally to both, thus recognizing that compensation benefits were to replace only lost wages. Similarly for highly paid employ-

[26]44 Stat. 1432, as amended, 33 U.S.C. 913 (1970 ed.).

[27]44 Stat. 1438, as amended, 33 U.S.C. 929 (1970 ed.).

[28]44 Stat. 1439, as amended, 33 U.S.C. 930 (1970 ed.).

[29]44 Stat. 1440, as amended, 33 U.S.C. 933 (1970 ed.).

[30]The original Act provided that compensation benefits for disability were not to exceed $25.00 per week. Act of March 4, 1927, c. 509, § 6(b), 44 Stat. 1426. The maximum compensation benefit for death was 66⅔% of the employee's average weekly wage, considered to be not more than $37.50 per week. Act of March 4, 1927, c. 509, § 9(c), 44 Stat. 1430. Thus the maximum amount for disability and death was identical. 66⅔% x $37.50 = $25.00.

[31]The next amendment in 1948 provided that disability benefits were not to exceed $35.00 per week. The maximum compensation for death was 66⅔% of the employee's average weekly wage, considered to be not more than $52.50. Act of June 24, 1948, c. 629 §§ 1, 3, 62 Stat. 602. Thus the maximum for disability and death benefits retained the identical limit. Subsequent amendments raised the benefits, but did not disturb this relationship of maximum disability and death compensation. Act of July 26, 1956, c. 735, §§ 1, 4, 70 Stat. 654, 655 ($54 and $81); Act of July 14, 1961, Pub. L. 87-87, §§ 1, 2, 75 Stat. 203 ($70 and $105).

ees, compensation benefits would only partially replace the lost wages.

It is respectfully submitted that the interpretation of the 1972 Amendments by the court below is a dramatic deviation from this historically persuasive evidence of Congressional intent and is also contrary to social policies which Congress wished to implement through the 1972 Amendments.

C. The decision below is contrary to the intent of Congress to implement a modern workers' compensation system based upon the recommendations of the National Commission on State Workmen's Compensation Laws.

The decision below also frustrates the Congressional intent to implement a modern workers' compensation system consistent with the recommendations of The Report by the National Commission on State Workmen's Compensation Laws.[32] Prior to the 1972

[32]The National Commission on State Workmen's Compensation Laws was created by Congress under the Occupational Safety and Health Act of 1970. December 29, 1970 Pub. L. 91-596, § 2, 84 Stat. 1590, 29 U.S.C. 651 (1970). The Commission was comprised of fifteen Presidential appointees from state workers' compensation agencies, industry, labor and medicine. The National Commission on State Workmen's Compensation Laws shall hereinafter be referred to as the National Commission.

The Congressional declaration of policy and statement of purposes provided in pertinent part as follows:

> The Congress hereby finds and declares that
>
> (A) the vast majority of American workers and their families are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; and
>
> (B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living. 84 Stat. 1616, 29 U.S.C. 676(a)(1) (1970).

Amendments the level of benefits was almost universally recognized as inadequate to provide a minimally sufficient income for disabled employees and their dependents.[32a] The last increase in the dollar maximum in compensation payments was in 1961.[33] While Congress also wished to solve coverage problems unique to the maritime worker and his third party litigation with vessel owners and stevedores,[34] revision of the benefits structure was of paramount importance.

In seeking to improve the level of benefits, Congress, its committees[35] and the sponsors[36] of the legis-

[32a]LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, HEARINGS BEFORE THE SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE ON S.2318, S.525 and S.1547, 92 Cong., 2d Sess. at 1. (Hereinafter cited as HEARINGS).

[33]July 14, 1961 Pub. L. 87-87, §§ 1, 2, 75 Stat. 203.

[34]See discussion in *Northeast Marine Terminals Co., Inc. v. Caputo*, 432 U.S. 249, 256-265; 53 L.Ed. 320, 329-334; 97 S.Ct. 2348, 2353-2358 (1977) by Mr. Justice Marshall.

[35]SENATE REPORT No. 92-1125, 92d Cong., Sess. (1972) (hereinafter referred to as S. REP. No. 92-1125) prepared by the Committee on Labor and Public Welfare states as follows:

> *Maximum and minimum benefit amounts*
>
> The basic requirement of the Act is for the injured worker to receive 66⅔% of his average weekly wage. Historically this ⅔ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. As a result of the 12 year freeze on increasing benefits under this Act the present $70 maximum results in few workers receiving ⅔ of their average weekly wages and many workers receiving as low as 30% of their average weekly wage.

lation which became law, all relied upon and endorsed the recommendations of The Report by the National Commission. The court below refers to that Report, but we submit, misinterprets and overlooks the portion of The Report dispositive of the issue herein presented.

Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor. The expectation is that a 200% maximum will enable approximately 90% of the work force covered by this Act to receive ⅔ of their average weekly wage. In order to ease the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps as follows: 125 percent or $167 whichever is greater during the period ending September 20, 1973; 150 percent during the period beginning October 1, 1973 and ending September 30, 1974; 175 percent during the period beginning October 1, 1974 and ending September 30, 1975; and 200 percent beginning October 1, 1975. These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws. (Emphasis in original, underscoring added).

[36]Immediately prior to the final Senate vote on the proposed amendments Senator Williams, one of the Bill's co-sponsors and Chairman of the Committee on Labor and Public Welfare, stated as follows:

"The National Commission on Workmen's Compensation laws which we created in passing the Occupational Health and Safety Act of 1970 has submitted a comprehensive report and recommendation of the need to upgrade workmen's compensation standards nationwide including if necessary the imposition of Federal standards.

"In the limited but significant area covered by the Longshoremen [sic] Act we have attempted to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission.

"I shall in the near future be giving careful consideration to a measure which will implement or improve upon the National Commission's recommendation and I certainly expect to use the improvements in this bill as a model." LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972 (G.P.O. 1972) at 372. (Hereinafter referred to as LEGISLATIVE HISTORY).

The recommendations of the National Commission for the four basic types of compensation benefits appear in Chapter 3 at pages 53-75. In the introduction of that section, the National Commission recommends benefits for all types of compensation at 80% of the employee's spendable income or 66⅔% of the employee's gross weekly wage, "subject to the State's maximum weekly benefit."[37] The report then specifically discusses temporary total, permanent total, permanent partial and death benefits with the recommendation for the last named as follows:

Maximum Weekly Benefit

The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

We recommend that as of July 1, 1973, the maximum weekly death benefit be at least 66⅔ percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

We recommend that as of July 1, 1977, the maximum weekly death benefit be at least 133⅓ percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166⅔ percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.[38]

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[37]REPORT OF THE NATIONAL COMMISSION at 56, 57.

[38]*Id.* at 71, 72.

Neither the National Commission, nor Congress by its reliance upon the recommendations, disturbs the fundamental concept of compensation as a replacement of lost wages, subject to an identical maximum for all classes of employees and dependents.

The opinion below omits any reference to this recommendation and instead excerpts[39] portions of the immediately preceding section entitled, "The Proportion of Lost Remuneration to be Replaced." This entire section is set forth in the margin[40] with under-

[39] *Rasmussen*, 567 F. 2d 1390, footnote 8; Solicitor General's Petition, App. A, at 12a.

[40] **E. DEATH BENEFITS**

Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. As the ultimate tragedy, work-related death deserves full compensation. The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

The Proportion of Lost Remuneration to Be Replaced

In most States, but not all, the proportion of the worker's weekly wage replaced by death benefits varies with the number of dependents. Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wage of the deceased; a widow or widower with two children under 18 receives 75 percent of the weekly wage; two orphans receive 50 percent of the deceased's weekly wage, and so on.

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66⅔ percent of lost wages is appropriate. *The*

scoring added beneath the language excerpted by the opinion below. A comparison of the discussion by the National Commission relating to the percentage of lost wages to be replaced versus the maximum weekly benefit discloses that the court's analysis fails to support the conclusion that Congress intended to abolish an identical maximum for death benefits. The decision below thus disrupts a proper and consonant interpretation of the Act consistent with fundamental principles of workers' compensation fixing identical maximum benefits for permanently disabled employees and their dependent survivors.

The finding of the court below providing inconsistent maximums contradicts the acknowledgement by

considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.

As in the total disability cases, wages lost by death cases are not necessarily the same as spendable income lost. A formula which relates death benefits to spendable earnings would take account of the impact of taxes and also would automatically adjust the benefit in response to the number of surviving dependents.

[R3.20] We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 80 percent of the worker's spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in a State exceeds 100 percent of the State's average weekly wage.

On a transitional basis, a less desirable formula may be used.

[R3.21] We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 66⅔ percent of the worker's gross weekly wage.

States may wish to pay a dependents' allowance in addition to the benefits based on gross weekly wages, but such an allowance would be inappropriate in addition to the benefits based on spendable earnings. For both types of benefits, protection against the value-eroding power of inflation is necessary.

[R3.22] We recommend that beneficiaries in death cases have their benefits increased through time in the same proportion as increases in the State's average weekly wage. REPORT OF THE NATIONAL COMMISSION at 71. (Emphasis added).

the National Commission that the economic impact on dependent survivors is no greater than the impact on families with a permanent totally disabled employee.[41]

[41]THE REPORT OF THE NATIONAL COMMISSION states in chapter one, entitled, "The General Objectives of Workmen's Compensation" states as follows:

> *While workmen's compensation benefits should be a substantial proportion of the worker's lost remuneration, there are reasons to set minimum and maximum weekly cash benefits.* A low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers. To avoid committing such a worker to dependence on welfare, a minimum weekly payment may be needed. Of course, if another program, such as a family income maintenance program, were to guarantee a basic level of income for all workers, there might be no need for minimum benefits under workmen's compensation.
>
> The arguments for maximum benefits are more troublesome. As long as benefits are linked to the losses in net remuneration caused by the work-related impairment, the task of providing incentives for return to work should be no more difficult for a worker with high earnings than for others. To argue that maximum benefits will reduce the costs of the program for employers is to ask disabled high-wage workers to bear a high proportion of their own lost remuneration. A somewhat more appealing argument for maximums is that highly paid workers presumably are able to provide their own insurance and to make decisions about risks. *A maximum limit on benefits would provide high-income workers an opportunity to design their own insurance programs: if, for example, the maximum benefits would replace only half of a high-wage worker's lost remuneration, he may choose to increase his private insurance.* Another possible argument for maximums is that if one conceives of workmen's compensation benefits being paid out of a fixed fund, then other uses for the fund, such as an extended duration for permanent total benefits, may have a greater priority than the replacement of a high proportion of lost remuneration for well paid workers. A final argument is that if workmen's compensation engages in some income distribution to the low-wage workers through the device of minimum benefits, then the same philosophy justifies income redistribution at the expense of high-wage workers. We are not totally unsympathetic to this philosophy, but we emphasize again that the primary purpose of workmen's compensation is to provide insurance against interruption of income, not welfare or income redistribution. *We conclude that there is an uneasy case for maximum and minimum benefits as long as they do not distort the primary insurance function of workmen's compensation.* (Emphasis added) REPORT OF THE NATIONAL COMMISSION at 37, 38.

THE SUPPLEMENTAL STUDIES for the National Commission (G.P.O. 1973) Volume 1 at 226 reinforces the arguments in favor of a maximum because of the availability of private insurance to highly paid employees. The Supplemental Studies state as follows:

> Survivor benefits are probably the most duplicated type of health benefit. Therefore, the likelihood of a family receiving income benefits from some other source is greater in the case of death than it is in other types of contingencies. One common source of funds derives from the receipts from a life insurance policy. At mid-year 1969, at least one member of 86 percent of American households owned some type of life insurance. Eighty-three percent of these families had coverage with legal reserve life insurance companies. The extent of ownership of policies varies according to the age of the head of the household, the region in which he lives and his income level. As might be expected, the middle and upper middle income groups are the most frequently insured, with 95 percent having life insurance. In families under the $5,000 income level, the percentage drops to about 70 percent. (Footnote omitted).

[42]Chamber of Commerce of the United States, ANALYSIS OF STAT. COMPENSATION LAWS (1975 ed.), states at 18 as follows:

> Although death is the ultimate work-related tragedy, the economic loss associated with death cases is often less than that of a permanent total disability. Because of these considerations, death benefits are generally paid to the spouse until remarriage and to the children until a specified age. In addition, some laws provide a maximum benefit total expressed as a maximum period for the payment of benefits.

Indeed there is compelling evidence that the economic effects of an industrial death are less devastating than the financial hardships forced upon the family of a permanently, totally disabled employee.[42]

II

READ AS A WHOLE AND WITH EFFECT GIVEN TO EACH PART THE ACT REQUIRES THE SAME MAXIMUM FOR DISABILITY AND FOR DEATH BENEFITS.

It is respectfully submitted that proper resolution of the question presented requires review of *all*

pertinent sections. The opinion below in emphasizing Section 9 only is fundamentally deficient in comparison to the scholarly and persuasive analysis of Sections 9, 6 and 10 by the Third and District of Columbia Circuit Courts of Appeals.

The critical language linking these Sections and imposing disability maximums upon death benefits appears in Subsection 6(d). Read by itself, Subsection 6(d) makes neither linguistic nor logical sense. It refers to "determinations under this subsection with respect to a period," but nowhere in the Act are the words "determinations" or "period" defined.

Only if this phrase refers to determinations of disability maximums under Subsections 6(d)(1), as found by the Third[43] and District of Columbia[44] Circuit Courts of Appeal, can the benefits scheme retain a harmonious and uniform meaning with all Sections consistent. If Subsection 6(d) refers, however, to the annual determination of the national average weekly wage in Subsection 6(d)(3), as found by the court below, then it affects only the minimum benefits and becomes nothing more than an unnecessary duplication of Subsection 10(f).[45] Surely Congress did not

[43] *O'Keefe*, 545 F. 2d at 344.

[44] *Boughman*, 545 F. 2d at 216.

[45] 86 Stat. 1258, 33 U.S.C. 910(f) (Supp. V) states as follows:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

intend an idle act by making Subsection 6(d) or 10(f) surplusage. The interpretation below thus removes all significance from one Section or the other.

The court below compounds its erroneous construction of Subsection 6(d) by suggesting that for the first time with the 1972 Amendments for disability and death benefits, "Congress deliberately chose to compute limitations in the two cases by entirely different methods."[46] Disability and death benefits have always, however, been computed by different methods.[47]

Prior to the 1972 Amendments the statutory formula for death benefits was always fixed at a percentage, not to exceed 66⅔% of the employee's average weekly wage. The average weekly wage in death cases was fixed at not more than a maximum dollar amount. For disability cases the compensation benefit itself, rather than the wage, was always a fixed dollar amount.

Merely because there are two different methods of mathematically calculating compensation, it does not follow that Congress intended to distinguish among the classes of beneficiaries by setting inconsistent maximums. The only persuasive evidence is that Congress set identical maximums.

This section makes the annual changes in the national average weekly wage equally applicable to all compensation benefits, including cases affected by the minimum. See footnote 19 of the opinion in *O'Keefe*, 545 F. 2d at 346, for the full explanation of the mathematical certainty of the effect achieved by Subsection 10(f), not Subsection 6(d).

[46] *Rasmussen*, 567 F. 2d at 1390, Solicitor General's Petition, App. A, at 12a.

[47] See, fns. 29, 30, *supra*.

The 1972 Amendments incorporated a sophisticated sliding scale of maximums, but through the operation of Subsection 6(d) did not disturb the imposition of the same maximum limit for disability and death. The Court below in finding an absolute maximum for disability but not death benefits favors one part of the Act without giving effect to the whole.

III

EXTRINSIC EVIDENCE OF THE LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS INDICATES THAT CONGRESS DID NOT INTEND TO ABOLISH A MAXIMUM LIMIT FOR WEEKLY DEATH BENEFITS.

Given the disputed significance of Subsection 6(d), this Honorable Court may also resort to extrinsic aids in deciphering the correct Congressional intent. The aids available in this case include Senate Subcommittee hearings,[48] legislative history of the Amendments,[49] reports of both Houses[50] and floor debate.[51] Set forth in the margin[52] are statements from these

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[48]HEARINGS, fn. 32, *supra*.

[49]LEGISLATIVE HISTORY, fn. 36, *supra*.

[50]S. REP. No. 92-1125; H.R. REP. No. 92-1441, 92 Cong., 2d Sess. (1972).

[51]CONG. REC., VOL. 118: 30670, 30397, 36376, 30323, 36265, Extension of Remarks, for October 18, 1972, E. 8847.

[52]Ralph Hartman, Assistant Manager Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corporation stated in pertinent part as follows:

> We recognize the intent of the proposal [Senate Bill, S. 2318, 92 Cong.] and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66⅔ percent of the injured employee's average weekly wages computed under section 10, *subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry*. HEARINGS at p. 171, 172. (Emphasis added)

sources in support of the employer's and carrier's position herein. The employer and carrier respectfully submit that the most persuasive evidence of Congressional intent appears in the Senate and House Reports summarizing the major provisions of the Bill which became the law.

The summaries with respect to disability and death benefits stated as follows:

> IMPROVEMENTS OF BENEFITS STRUCTURE:
>
> MAXIMUM AND MINIMUM BENEFITS AMOUNTS
>
> To the extent that employees receiving compensation for total permanent disability or *survivors receiving death benefits* receive less than the compensation they would receive if there were no phase-in, their compensation is to be *increased* as the ceiling moves to 200%.[53] (Emphasis added)

Edward Hood, President and Board Chairman of the Shipbuilders Council of America, supplemented Mr. Hartman's remarks as follows:

> I would like to say that Mr. Hartman's statements reflect a consensus of the membership of the shipbuilders' council. HEARINGS at p. 177.

On October 14, 1972, the day when the amendments with modifications were passed by both the House and Senate (118 CONG. REC. 36225, 36275; LEGISLATIVE HISTORY at p. 286), Congressman Daniels spoke in support of the amendments as follows:

> Mr. Speaker, I would like to go into the major provisions of the bill.
>
> A basic requirement of the act is for the injured worker to receive 66⅔ percent of his average weekly wage. As the result of the 12 year freeze, very few workers now actually receive this figure. The bill seeks to correct this deficiency. It provides *that the maximum compensation for disability shall not exceed a percentage of the national weekly wage to be determined by the Secretary of Labor*. LEGISLATIVE HISTORY at p. 286 (Emphasis added).

[53]S. REP. No. 92-1125 at 5.

On the day of passage of the Amendments, Senator Williams, a co-sponsor, read into the Congressional Record with approval the passage quoted above.[54]

A report subsequent to the passage[55] of the 1972 Amendments from the same Senate committee which produced the legislation states as follows:

> AMOUNTS OF BENEFITS
>
> Compensation for disability *and death* is based on the average weekly wage of the injured worker. *Maximum benefits may not exceed a specified percentage of the national average weekly wage.* The percentage increases from 125 prior to September 30, 1973, to 200 beginning October 1, 1975. The minimum 50 percent of the national average weekly wages or the employee's actual weekly wage, whichever is less.[56] (Emphasis added)

We submit that this clear expression of Congressional intent deserves the support of this Honorable Court.

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[54] LEGISLATIVE HISTORY at 374; 118 CONG. REC. 36270.

[55] *Cf. Red Lyon Broadcasting Co. v. Federal Communications Comm'n,* 395 U.S. 367 (1968) (A report subsequent to the passage of the amendment does not deserve weight co-equal to statements made contemporaneously with passage).

[56] COMPILATION OF SELECTED LABOR LAWS, PERTAINING TO LABOR RELATIONS, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (G.P.O. 1974).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment and decision of the court below should be reversed.

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(Appendix Follows)

APPENDIX

Appendix

By this reference, petitioners incorporate as if set forth in full the appendices printed in the Petition for Writ of Certiorari, No. 77-1465, filed April 14, 1978, by the Solicitor General on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, requesting review of the same decision of the Ninth Circuit Court of Appeals.